

compensate for the instability associated with high water content, leading to skin discomfort and/or irritation upon use. (Page 2, lines 10-14). Other W/O emulsions have lacked stability under fluctuating temperature conditions. (Page 2, line 15 through page 3, line 9).

The claimed invention addresses such problems associated with W/O emulsions. The pending claims relate to W/O emulsions containing a silicone emulsifier which is a dimethicone copolyol comprising only oxyethylene groups as oxyalkylene groups, wherein the aqueous phase is present in an amount of at least 80% by weight relative to the total weight of the emulsion and the oily phase to silicone emulsifier weight ratio is greater than or equal to 5.

These compositions, despite their high water content, are stable even when stored under conditions of fluctuating temperatures. (Page 3, lines 19-21). Moreover, the claimed compositions have rheological characteristics such that, when applied to skin, the composition "breaks" (that is, suddenly becomes fluid under the effect of shear), thereby providing great freshness. (Page 4, lines 1-2).

Regarding the improved stability characteristics under fluctuating temperature conditions, Applicant notes the examples in the present specification demonstrate that the claimed compositions possess good stability under such conditions, whereas comparative compositions do not.

Regarding the improved rheological characteristics of the claimed compositions, Applicant notes that the Rule 132 declaration of Mme. Chevalier (submitted July 24, 2002) demonstrates that W/O emulsions containing 80% or more aqueous phase and the claimed silicone emulsifier "break" more readily than W/O emulsions containing less aqueous phase (70% aqueous phase). As noted in the Chevalier declaration, the ability to "break" indicates that compositions having 80% or more aqueous phase possess better fluidization properties

and, hence, provide greater freshness upon application to skin than emulsions containing prior art amounts of aqueous phase, a “surprising and unexpected difference” between these emulsions.

The July 24 declaration and accompanying data also demonstrate that W/O emulsions corresponding to Mellul’s example 24 are unacceptable for use in the cosmetic industry (that is, they are crude pastes), whereas the claimed compositions are cream products suitable for use in cosmetics. This difference was “surprising and unexpected” as well.

Applicant submits that the improved rheological and physical characteristics of the claimed compositions as set forth in the previously-submitted Rule 132 declaration, as well as the compositions’ improved stability under fluctuating temperature conditions, demonstrate that the claimed compositions are not obvious and, thus, deserving of patent protection.

In view of this background, the sole rejection in the Office Action will now be addressed.

#### **REJECTIONS UNDER 35 U.S.C. §103**

The Office Action rejected claims 1-22 and 25-29 under 35 U.S.C. § 103 as obvious over U.S. patent 5,851,539 (“Mellul”), and claims 23 and 24 under 35 U.S.C. § 103 as obvious over Mellul in view of The Condensed Chemical Dictionary. In making these rejections, the Office Action stated that the Rule 132 declaration submitted July 24, 2002, was not persuasive because (1) the claims are not commensurate in scope with the Rule 132 declaration (as well as the examples in the specification) because the claims do not require an electrolyte or glycerol in the aqueous phase; and (2) the graphs accompanying the declaration are unclear because they are not labeled and it is unclear what the different lines represent.

Regarding (1), Applicant respectfully submits that it is not necessary to require the presence of an electrolyte and glycerol in the claims. The comparative examples discussed in the specification and the previously-submitted Rule 132 declaration contain an electrolyte (NaCl) and glycerol (glycerin). However, as the specification and declaration indicate, the comparative examples do not possess the beneficial properties and characteristics of the claimed invention. Thus, the presence of an electrolyte and glycerin does not appear to materially affect the claimed compositions. Accordingly, their presence is not required in the claimed invention.

Regarding (2), Applicant submits herewith a Rule 132 declaration providing further explanation of the data in the previously-submitted Rule 132 declaration. In the new declaration, it is explained that the previously-submitted graphs depict shear rates as a function of time for various applied shear stresses, and that the graph for the comparative example CM 3/5 contains flat lines at each of the applied shear stresses. The declaration goes on to explain that these flat lines indicate that evolution of shear rates does not occur upon application of the shear stresses, meaning that the comparative composition CM 3/5 does not readily “break” or become fluid, but that the lines for the compositions of the present invention are not flat, indicating that these compositions break much more readily than the comparative example. Applicant respectfully submits that this further explanation sufficiently clarifies the information set forth in the previously-submitted Rule 132 declaration.

Thus, even assuming *arguendo* that the Office Action has established a *prima facie* case of obviousness --which it has not<sup>1</sup>-- the Rule 132 declarations submitted in this case and

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<sup>1</sup> Applicant’s July 24, 2002, response sets forth the reasons why no *prima facie* case of obviousness has been established. For sake of brevity, Applicant will not repeat these arguments herein.

the examples in the specification are more than sufficient to overcome such a hypothetical *prima facie* showing. The declarations demonstrate that W/O emulsions containing 80% or more aqueous phase “unexpectedly and surprisingly” break more readily than emulsions containing less aqueous phase, meaning that the former compositions have more aqueous phase available for contact with skin than the latter emulsions. The declarations indicate that this difference is significant because it provides W/O emulsions having 80% or more aqueous phase a fresher feeling upon application, an important characteristic in the cosmetic field. The declarations also demonstrate that compositions corresponding to Mellul’s Example 24 are unsuitable for use in the cosmetic industry, unlike the claimed invention. Finally, the examples in the present specification demonstrate that compositions containing the claimed silicone surfactant are more stable under fluctuating temperature conditions than compositions containing other silicone surfactants, making the former compositions better suited for commercial production, storage and transport than the latter compositions.

In view of the above, Applicant respectfully requests that the rejections under 35 U.S.C. §103 be withdrawn.

Applicant believes that the present application is in condition for allowance. Prompt and favorable consideration is earnestly solicited.

Respectfully submitted,

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